United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL 74-1357

No. 74-1357

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

AMERICAN BRANDS, INC.,

Plaintiff-Appellant,

against

PLAYGIRL, INC.,

Defendant-Appellee.

Interlocutory Appeal From the United States District Court for the Southern District of New York.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE PLAYGIRL, INC.

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW.

The sole issue presented by this appeal is whether the District Court abused its discretion by denying the motion of plaintiff-appellant American Brands, Inc. (hereinafter "American") for a preliminary injunction against defendant-appellee Playgirl, Inc. (hereinafter "Playgirl").

STATEMENT OF THE CASE.

I.

Nature of the Case and the Proceedings and the Disposition in the District Court.

This is an action for a declaratory judgment as to the rights and liabilities of the parties to a contract and for specific performance thereof.

The plaintiff American, a New Jersey corporation, and formerly known as the American Tobacco Company, is essentially a manufacturer of tobacco products such as cigarettes, cigars and the like. The defendant Playgirl, a California corporation, is the neophyte publisher of Playgirl Magazine.

This action was commenced on February 13, 1974, in the Supreme Court of the State of New York, County of New York, Playgirl having been on that date served with a Summons and Complaint (A 70-78) and an Order to Show Cause (A 12-13) returnable on February 19, 1974.

A hearing was held on February 19, 1974, in the Courtroom of the Honorable Hyman Korn, Justice of The Supreme Court of the State of New York. Subsequent to hearing the arguments of counsel for the respective parties, Justice Korn recommended that a settlement conference be held in his chambers. Pursuant to such recommendation and upon agreement of the parties, a settlement conference was scheduled for, and convened in the chambers of Justice Korn, on February 20, 1974. Such conference was promptly adjourned upon American immediately informing Justice Korn that American would not settle or discuss settlement. Playgirl was permitted until March 1, 1974, to

file a Supplemental Memorandum of Law as an accommodation to Playgirl's counsel being from California.

This case was removed on February 27, 1974, to the United States District Court for the Southern District of New York by the filing of Playgirl's Petition for Removal (A 65-67) and bond which were on the same date duly served on American and filed with the Supreme Court of the State of New York.

On March 4, 1974, American obtained an Order to Show Cause (A 3-5) from the Honorable Charles A. Brieant, Jr., United States District Judge, which Order was returnable on March 6, 1974. Oral argument was conducted in the Courtroom of Judge Brieant on March 6, 1974, at which time American's Motion for Preliminary Injunction was denied, Judge Brieant making findings under Rule 65, Federal Rules of Civil Procedure (Transcript, A 114-132).

II.
Statement of the Facts.

Playgirl commenced in 1973 to publish Playgirl Magazine, a monthly periodical. The maiden issue was dated June 1973 and was first sold in May. The first three issues were printed in quantities of 600,000, 700,000 and 1,000,000 copies at an approximate cost of $500,000.00 before the first issue was placed on sale. Monthly issues are currently being printed in quantities of approximately 2,000,000 copies.

Typically, advertising was desired for Playgirl Magazine and a contract with Carl Vann Company was entered into for the purpose of having orders for advertising solicited (Vann Aff. para. 1, A 62, and Miles Aff. para. 4, and Ex. A, A 84, 90-93). Under such contract,

Carl Vann Company was an independent contractor (Vann Aff. para. 1, A 62, Ritter Aff. para. 3, A 59, and Miles Aff. para. 4 and Ex. A, A 84, 92).

The American Tobacco Company division of American was among the many advertisers that were contacted by Carl Vann of said Carl Vann Company and which have purchased advertising in Playgirl Magazine. Negotiations were conducted with Norman Chester of said American Tobacco Company (Vann Aff. para. 3, A 62). At the outset Chester demanded that American Tobacco Company be granted a perpetual right to have its advertising appear on the back cover of Playgirl Magazine. Such demand was refused and never mentioned again (Vann Aff. para. 4, A 63).

A letter agreement dated January 26, 1973, was eventually prepared by American (Vann Aff. para. 6, A 63) and signed by Carl Vann. In signing the argument, Vann somehow did not observe the one paragraph appearing on the reverse face of the letter which American now seeks to enforce (Vann Aff. para. 5, A 63). American relies on that one paragraph in its claim to have the perpetual right to have its cigarette advertisements on the back cover of Playgirl Magazine.

The Agreement dated January 26, 1973, served to reserve eight back covers of Playgirl Magazine for advertising of Tareyton cigarettes made by American Tobacco Company at a cost of $5,000.00 (Chester Aff. Ex. A, A 23). American Tobacco Company also reserved the absolute unconditioned right to cancel the advertising space covered by the Agreement, the Agreement stating:

> "We reserve a cancellation privilege as to the use of this space" (Chester Aff. Ex. A, A 21).

American through its advertising agent, Batten, Barton, Durstine & Osborn, has in the past already exercised its right of cancellation by cancelling an advertisement that was to have been printed (Miles Aff. para. 9 and Ex. D, A 85, 96).

All advertising space in Playgirl Magazine, as well as other magazines, has a predetermined rate essentially based on the circulation of the magazine, the location of the advertising space, and the amount of space used. The back cover of Playgirl Magazine or any other magazine is nominally more expensive than inside covers and the interior pages of the magazine (Miles Aff. para. 23, A 88). The present advertising rate for the back cover of Playgirl Magazine is $13,-360.00 based on the circulation of 2,000,000 copies. Other magazines having a comparable circulation generally have a comparable advertising rate applicable to the back cover of the magazine (Miles Aff. para. 24, A 88).

Subsequent to signing the subject agreement, Carl Vann notified Playgirl that American Tobacco Company had agreed to purchase the back cover of Playgirl Magazine for the purpose of placing its advertising thereon (Vann Aff. para. 8, A 64). In accordance with customary advertising practice in the publishing field, Playgirl thereafter received monthly "insertion orders" from American's advertising representative, Batten, Barton, Durstine & Osborn, Inc., requesting that advertising of the American Tobacco Company for its Tareyton cigarettes be printed on the back cover of Playgirl Magazine.

Such insertion orders typically include a request that specified advertising for an identified product be print-

ed at a specific location of an issue of a magazine (Miles Aff. Ex. F, A 98, 100, 102, 104, 106, 108, 110). Each of said insertion orders was acknowledged, the acknowledgements reiterating the requested placing of advertising and stating the cost thereof (Miles Aff. Ex. F, A 99, 101, 103, 105, 107, 109, 111). Until actual printing, no payment for the advertising is due and the advertising can be cancelled by the advertiser.

Similar procedures are followed throughout the publishing industry and have been followed by Playgirl with the numerous other advertisers whose products have been advertised in each of the issues of Playgirl Magazine that have been published.

Although the Tareyton cigarette advertisements of American were being printed in Playgirl Magazine, Playgirl did not become aware of the terms of the subject letter agreement until sometime in the fall of 1973 when Carl Vann first provided a copy of the agreement to defendant Playgirl (Vann Aff. para. 8, A 64, and Miles Aff. para. 12, A 86). Playgirl promptly instructed Carl Vann to advise American Tobacco Company that no perpetual rights would be accepted or agreed to by Playgirl (Vann Aff. para. 8, A 64, and Miles Aff. para. 13, A 86). American was thereafter notified by a letter dated September 25, 1973, from Carl Vann to T. B. Fealey that it was against the policy of Playgirl to grant perpetual rights to any advertiser (Chester Aff. Ex. B, A 24). American Tobacco Company was again effectively notified of the same by a letter, dated December 3, 1973, from William J. Miles, Jr. to Norman Chester (Chester Aff. Ex. C, A 25) and again by a letter dated December 20, 1973, from Leo J. Dean to Norman Chester (Chester Aff. Ex. E, A 27).

It is not clear that even T. B. Fealey, of American Tobacco Company and the author of said agreement, knew of the presence of said single paragraph on the back of her letter. Certainly she must have believed that John Weller, who was employed with the advertising agency of Martin & Hart which also sought advertising for Playgirl, did not earlier know of the paragraph allegedly granting perpetual rights to American Tobacco Company; otherwise, she would have had no need to call special attention to said paragraph of the agreement by writing "note last paragraph of contract", in a letter dated July 17, 1973, to John Weller requesting that an accompanying duplicate agreement, newly dated March 9, 1973, be signed for Playgirl (Defendant's Memo. Ex. 1, A 55).

Playgirl has made numerous efforts to accommodate the advertising needs of American by proposing several advertising plans to American since at least as early as December 1973 (Miles Aff. paras. 16, 18, and 20, A 87, and Ritter Aff. para. 6, A 60). Each of Playgirl's proposals have been refused by American (Ritter Aff. para. 8, A 60, and Miles Aff. paras. 17, 19, and 20. A 87). Playgirl has, nevertheless, continued to print cigarette advertising of American Tobacco Company for the months of January through May 1974, in accordance with insertion orders submitted during the period and while proposals of Playgirl were being made to American (Ritter Aff. para. 4, A 59).

The contents of each Playgirl Magazine must be finalized approximately three months in advance of the scheduled date of sale to allow for printing, binding, shipment and distribution to retail outlets. The adament refusal by American Tobacco Company of all advertising proposals of Playgirl has forced Playgirl to

seek other advertisers for its pages and covers or be faced with printing blank pages and the inability to finalize the magazine contents in time for monthly printing and distribution (Ritter Aff. para. 9, A 60, and Miles Aff. para. 25, A 88). It is apparent from the following exchange, at the hearing before Judge Brieant, that American believes that it can economically coerce Playgirl into doing its bidding:

> "THE COURT: They put on a totally blank cover—what good does that do society?
>
> "MR. O'NEILL: They don't. They will accept my ad and the money for my ad as a practical matter." (Transcript, A 120).

American being unwilling to discuss a compatible and fair advertising program, Playgirl has been forced to, at this time, accept other advertisers for the back cover of Playgirl Magazine for issues in the calendar year 1974. Other future issues are yet to be committed and Playgirl is not bound by any custom, practice, or the like, to furnish uncommitted advertising space including back covers of Playgirl Magazine to any particular advertiser including former advertisers (Ritter Aff. paras. 10, and 11, A 61, and Miles Aff. paras. 26 and 27, A 89). If Playgirl is now forced to print the advertising of American, existing arrangements made with other advertisers would be necessarily upset and considerable hardship to both Playgirl and its advertisers would result.

ARGUMENT.

I.

Summary of the Argument.

The question for decision is whether the District Court abused its discretion by denying American's motion for a preliminary injunction requiring Playgirl to print cigarette advertising of American, or not print the advertising of any other advertiser, on the back cover of Playgirl Magazine.

The award of a preliminary injunction is an extraordinary remedy that is not granted unless there is a clear showing of probable success by, and irreparable injury to, the petitioner. Also to be considered are the relative hardships to the parties and the need for Court supervision of an enjoined party.

After reviewing the pleadings, affidavits and other papers on file, the Court found that American had utterly failed to show that it will suffer any irreparable injury. Further, the District Court found that to grant a mandatory injunction would require supervision of Playgirl Magazine by the Court and that the balance of hardships would fall on Playgirl.

While the Court found that the litigation presents fair grounds for controversy and that the Complaint should not be dismissed on its face, American did not show, and the Court did not find, that American had a reasonable certainty of succeeding on the merits at a final hearing.

The findings of the District Court are not clearly erroneous and should be accepted pursuant to Rule 52(a), Federal Rules of Civil Procedure. In view of such findings, there has been no abuse of discretion by the District Court in its refusal to grant the preliminary injunction requested by American.

II.

Abuse of Discretion Must Be Found on Review.

The rules guiding the appellate review of the decision of a District Court with respect to the granting or denial of a preliminary injunction are clear. Hence, only a brief recital is believed to be here necessary.

A decision of the District Court is reversed only if such court has abused its discretion in granting or denying a preliminary injunction, in view of the pleadings, affidavits, and other papers on file. See *United States v. W. T. Grant Co.*, 345 U.S. 629, 73 S.Ct. 894, 97 L. Ed. 1303 (1953); *United States v. Corrick*, 298 U.S. 435, 56 S.Ct. 829, 80 L.Ed. 1263 (1936); *Meccano Ltd. v. John Wanamaker*, 253 U.S. 136, 40 S.Ct. 463, 64 L.Ed. 822 (1920); *Packard Instrument Company v. ANS, Inc.*, 416 F.2d 943 (2 Cir. 1969); *Unicon Management Corp. v. Koppers Management Co.*, 366 F.2d 199 (2 Cir. 1966); *Societe Comptoir de L'Industrie Cotonniere Etablissements Boussac, et al. v. Alexander's Department Stores, Inc.*, 299 F.2d 33 (2 Cir. 1962); *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738 (2 Cir. 1953); *Huber Baking Co. v. Stroehmann Bros. Co., et al.*, 208 F.2d 464 (2 Cir. 1953).

Writing for the court in *Huber Baking Co. v. Stroehmann Bros. Co., et al., supra*, Chief Judge Chase stated:

> ". . . A motion for an injunction *pendente lite* is addressed to the sound judicial discretion of the court and unless the record on appeal clearly shows that such discretion has not been exercised, or has been exercised without due regard for the applicable equitable principles, i.e., that there has been an abuse of discretion, the order will not be disturbed. [cases cited]." (208 F.2d at p. 467).

III.

A Preliminary Injunction Is an Extraordinary Remedy That May Not Be Properly Granted in This Case.

A. Generally.

"The award of a preliminary injunction is an extraordinary remedy which will not be granted unless upon a clear showing of probable success and possible irreparable injury to the plaintiffs, lest the proper freedom of action of the defendant be circumscribed when no wrong has been committed". *Societe Comptoir de L'Industrie, Cotonniere Establissements Boussac, et al.*, 229 F.2d at page 35. *See also Packard Instrument Company v. ANS, Inc., supra; Unicon Management Corp. v. Koppers Management Co., supra.*

Writing for the Court in *Unicon Management Corp. v. Koppers Management Co., supra,* Chief Judge Lumbard stated:

> "We reaffirm our holding in H. E. Fletcher Co. v. Rock of Ages Corp., 326 F.2d 13, 17 (2 Cir. 1963), that the party seeking a preliminary injunction has a 'burden of convincing' [the Court] 'with reasonable certainty' that it 'must succeed at final hearing'. Hall Signal Co. v. General Ry. Signal Co., 153 F. 907, 908 (2 Cir. 1907), where, as there, it appears that a 'lack of adequate showing of irreparable damage' also exists". (366 F. 2d at p. 204).

B. American Has Not Shown and Cannot Show a Reasonable Certainty of Success.

American has not met its burden of showing the Court that it will, with reasonable certainty, prevail at final hearing. In fact, it is unable to show that it will

ultimately prevail, for the subject agreement is clearly void and unenforceable for lacking mutuality of obligation and hence valid consideration.

The subject agreement reserves to American Tobacco Company the absolute right to cancel. The agreement states:

> "We reserve a cancellation privilege as to the use of this space" (Agreement para. 6, A 21).

The absolute right of American Tobacco Co. to cancel makes the subject agreement a classic. It is hornbook law that any promise reserving an absolute right of cancellation in the promisor in reality promises nothing at all and so is insufficient consideration.

Strobe v. Netherland Co., Inc., 245 App.Div. 573, 283 N.Y.S. 246 (4th Dept. 1935) involved a contract of which the plaintiff Strobe sought specific performance. In holding that the contract lacked mutuality and hence was lacking in sufficient consideration for a binding contract, the Court stated:

> "While the 1926 contract provides that its term shall be twelve months from its date, and that it shall be considered renewed if not terminated by the parties, it is expressly stipulated that it may be ended at any time by the defendant, and that the salesman may also bring it to completion by giving a three weeks' written notice. We, therefore, have an instrument where the plaintiff is bound by various stipulations for a definite period of time, but where the defendant can be entirely freed from all obligations thereunder at any moment it elects to terminate the agreement. Mutuality is lacking when only one of the contracting parties is bound to perform.

" 'A promise is a good consideration for a promise. But no promise constitutes such a consideration which is not obligatory upon the party promising'. Cold Blast Transportation Co. v. Kansas City Bolt & Nut Co. (C.C.A.) 114 F. 77, 79, 57 L.R.A. 696.

" 'Either all is a nudum pactum, or else the one promise is as good as the other'. Harrison v. Cage, 5 Mod. 411.

"The promises of neither party are binding unless those of both are obligatory.

"This contract has been in force, and the parties have been acting under it since February 27, 1926. So far as it has been executed, it is founded upon a good consideration and is a valid agreement, but in the future, when it is executory only, when it conveys only a chose in action, it is a unilateral agreement, and a mere nudum pactum. There is no legal or binding obligation upon the defendant, because it can terminate its promise at any moment it sees fit so to do. It is analogous to an option, without consideration, which cannot be enforced. Defendant's bargain was to do the things specified in the document, and those which are read into it by implication, only so long as it pleased it so to do, and when the spirit moved it could put an end to the agreement by its mere ipse dixit. This is an insufficient consideration for a binding contract. (cases cited)" (283 N.Y.S. at p. 252).

The Court went on to state:

"It is a well-settled rule of equity . . . that an agreement will not be enforced unless it is founded

upon a valuable consideration, and is mutual in its obligation and in its remedy. Palmer v. Gould, 144 N.Y. 671, 674, 39 N.E. 378; Cook v. Casler, 87 App. Div. 8, 10, 83 N.Y.S. 1045; Phillips v. Berger, 8 Barb. 527; Woodward v. Harris, 2 Barb. 439, 442". (283 N.Y.S. at p. 253).

The case of *Miami Coca Cola Bottling Company v. Orange Crush Company*, 296 Fed. 693 (5 Cir. 1924) involved facts that closely parallel this case. The Orange Crush Company had agreed, among other things, to supply concentrate to Miami Coca Cola which in return agreed to purchase certain quantities of the concentrate. A perpetual license had been granted to Miami Coca Cola but the contract contained a proviso to the effect that Miami Coca Cola might at any time cancel the contract. The parties operated under the contract for about a year, after which Orange Crush notified Miami Coca Cola that it would no longer be bound. The Court stated:

". . . [T]he contract was void for lack of mutuality . . . So far . . . as the contract remains executory, it is not binding, since it can be terminated at the will of one of the parties to it. The consideration was a promise for a promise. But the Appellant did not promise to do anything, and could at any time cancel the contract. According to the great weight of authority such a contract is unenforceable. Marble Co. v. Ripley, 10 Wall. 339. 359, 19 L. Ed. 955; Willard Sutherland & Co. v. United States, 262 U.S. 489, 43 Sup. Ct. 592, 67 L. Ed. 1086; Velie Motor Car Co. v. Kopmeier Motor Car Co., 194 Fed. 324, 114 C.C.A. 28-; *McCaffrey v. Knight* (D.C.) 282 Fed. 334; *Fowler Utilities Co. v. Gray*, 168 Ind.

1, 79 N.E. 897, 7 L.R.A. (N.S.) 726, 120 Am. St. Rep. 344; 6 R. C. L. 691; 1 Williston, pp. 219, 222. The contract cannot be upheld upon the theory that the appellant had a continuing option, because an option to be valid must be supported by a consideration. 6 R. C. L. 687.

"In Express Co. v. Railroad Co., 99 U.S. 191, it is said, at page 200 (25 L. Ed. 319): 'A court of equity never interferes where the power of revocation exists.' The reason given is that it is within the power of one of the parties to render the action of the court a nullity." (296 Fed. at p. 694).

Clearly, American's reservation of an absolute right to cancel at any time renders the subject agreement void.

The single paragraph on the back of the letter agreement that is relied on by American in its claim to a perpetual right to have its ads printed on the back cover of Playgirl Magazine, when carefully read, literally amounts to no more than a statement of "understanding" of American Tobacco Co.; but no grant or agreement by Playgirl, even if the signing of Carl Vann is found to bind Playgirl. It is literally impossible to interpret such paragraph as a promise by Playgirl conveying a perpetual right of any kind to American. The paragraph states as follows:

"*Your acceptance below of this agreement shall also serve to acknowledge *our* undersanding [sic] that *we* have the continuing and irrevocable right, at *our* option, to buy the back cover of Playgirl each and every twelve month period, for each issue of Playgirl within that period, for as long a time as Playgirl shall continue to be published." [emphasis added] (A 22).

American having written the letter agreement, and from a reading of the entire agreement, it is perfectly clear that the pronouns "our" and "we" are consistent references to the American Tobacco Company. Hence, the literal effect of the paragraph relied on by American is only to state that "acceptance" of the agreement serves to "acknowledge" the "understanding" of American Tobacco Company with respect to its having a continuing and irrevocable right, at its option, to buy the back cover of Playgirl Magazine for the life of the magazine. No promise whatsoever is made by or on behalf of the defendant, Playgirl.

The case of *Railroad Service & Advertising Co. v. Lazell Perfumer*, 192 N.Y.S. 686 (2d Dept. 1922) closely parallels the instant case by involving an advertising contract substantially similar to the subject agreement. The Appeals Court affirmed the decision of the lower court that the contract lacked mutuality, and quoted the lower court as follows:

> "It appears from the contract that the defendant merely authorized the plaintiff to render certain service for it in the form of advertising. It appears from the complaint that this authorization was accepted by the plaintiff in writing. Under the authorization, the defendant clearly made certain agreements by which it obligated itself to make various payments to the plaintiff; but the difficulty with the contract lies in the fact that the plaintiff in its written acceptance failed to obligate itself to perform any of the service set forth in the defendant's authorization. It never promised and agreed to place the advertising cards in accordance with the terms of the authorization, and in the absence of such an agreement the alleged

contract is wanting in mutuality and cannot be enforced. White v. Allen Kingston Motor Car Co., 69 Misc. Rep. 627, 126 N.Y. Supp. 150; Commercial Wood & Cement Co. v. Northampton Portland Cement Co., 115 App. Div. 388, 100 N.Y. Supp. 960.

"A definite authorization may be made by one party to another to do a certain thing; but the mere acceptance of such offer, without a promise to in turn comply with the terms of that offer and to obligate the acceptor does not make a valid contract, for one is bound while the other is not. Such offer and acceptance would not constitute an enforceable contract because of lack of mutuality. 9 Cyc. 227." (192 N.Y.S. at p. 686).

Further, irrespective of the "cancellation privilege" reserved by American Tobacco Company it is not obligated to purchase the advertising space in defendant's Magazine that it now demands. The paragraph relied on by American states, ". . . we have the . . . right, at our option, to buy . . ." (A 22). Clearly, American can with impunity choose to buy or not to buy and is therefore not bound to do anything.

Time has seemingly reversed the attitude of the American Tobacco Company. Over eighty years ago in the case of *Rafolovitz v. American Tobacco Co.*, 73 Hun. 87, 25 N.Y.S. 1036 (1st Dept. 1893) Rafolovitz sought specific performance of a contract by American Tobacco Co. which had agreed to pay Rafolovitz a commission of twenty cents on every thousand cigarettes that Rafolovitz bought from American Tobacco Co. It seems that Rafolovitz purchased nearly 200,000 cigarettes before American Tobacco Co. refused to sell

Rafolovitz any more cigarettes. In affirming the lower court decision, Judge Parker writing for the Appeals Court stated:

> "The court held that there was no mutuality of contract, and therefore not enforceable; that it would have been otherwise had the plaintiff bound himself to have purchased a given quantity of cigarettes; that under the agreement as alleged it was optional with the plaintiff to purchase cigarettes or not. If, after making it, he had refused to take any, or, after taking a few thousand, had declined to purchase others, the defendant could not have compelled him either to take cigarettes or respond in damages for not doing so; and as he made no promise, there was no basis for a consideration for the promise of the party to the alleged agreement" (25 N.Y.S. at p. 1037).

A consistent decision is found in *Gross v. Stampler*, 165 N.Y.S. 214 (1st Dept. 1917) which involved an agreement under which bread was supplied to plaintiff for awhile; but before expiration of the term of the agreement, the defendant refused to furnish any more bread. In reversing the lower court's decision and dismissing the Complaint, the Appeals Court stated:

> "Assuming the plaintiff's testimony to be true, there was no enforceable contract between the parties because there was no consideration for the defendant's alleged promise. The plaintiff did not obligate himself to purchase any bread or to do anything else. All that he agreed to do was to pay the stipulated price in case he should order some bread. The transaction between the parties was analogous to an option given without consideration, and it could be rescinded at any time." (165 N.Y.S. at p. 215).

Again the same decision was reached in the more recent case of *Souvern Fabrics Corp. v. Virginia Fibre Corporation*, 37 A.D. 2d 925, 325 N.Y.S. 2d 973 (1st Dept. 1971). In that case the plaintiff sought to enforce a contract that left it free to forbear from placing any order for fabrics but sought to forever bind the defendant not to make the same fabric for anyone else. In affirming the lower court decision that the contract lacked mutuality and was unenforceable, the Appeals Court stated:

> "To Special Term's well reasoned opinion we would add that the record clearly discloses that the plaintiff seeks recovery under an alleged contract which left plaintiff free to forbear from placing any order for fabrics but sought to forever bind the defendant not to make the same fabric for anyone else. Consequently, mutuality of obligation is lacking and the contract is unenforceable. See Van Slyke News Agency, Inc. v. News Syndicate Co. Inc., 207 App.Div. 736, 202 N.Y.S. 725 (1924), appeal dismissed, 249 N.Y. 602, 164 N.E. 600. 'Unless both parties to a contract are bound, so that either can sue the other for a breach, neither is bound'. Schlegel Manufacturing Co. v. Peter Cooper's Glue Factory, 231 N.Y. 459, 462, 132 N.E. 148, 149 (1921)." (325 N.Y.S. 2d at pp. 973, 974).

There can be no doubt, the contract at issue is lacking in mutuality since American is free to at any time forbear from placing any order for advertising in Playgirl Magazine. And further, any such order can be cancelled at any time by American.

Even assuming *arguendo* that the paragraph relied on by American created an option by which American

could buy additional back covers of Playgirl Magazine, the notifications by the aforementioned letter dated September 25, 1973, addressed to T. B. Fealey from Carl L. Vann (Chester Aff. Ex. B, A 24) advising, "It is against our policy to sign a contract which affords an advertiser a position of protection in perpetuity" revoked such option. Similarly, the letter dated December 3, 1973, to Norman Chester from William J. Miles, Jr. (Chester Aff. Ex. C, A 25) would serve to repudiate and revoke any such option that may have been created by advising, "Playgirl has elected to diversify its back cover advertisers". The same result is produced by the letter dated December 20, 1973, to Norman Chester from Leo J. Dean (Chester Aff. Ex. E, A 27). Clearly, such was the interpretation of Norman H. Chester as revealed by his Affidavit submitted by American in this action (Chester Aff. paras. 16, 17, 18, 19, A 16, 17).

American apparently contends that an irrevocable written option is covered by McKinney's General Obligations Law § 5-1109. However, such section clearly refers to "offers" not options. Even more clearly, note 10 to § 5-1103 of such General Obligations Law, under the hearing "option agreements" refers to the case of *Grainger v. Shea Enterprises, Inc.*, 282 App. Div. 730, 122 N.Y.S. 2d 275 (2d Dept. 1953), which held that an option agreement, not covered by such § 5-1103 by having been made as an alteration or change to an existing agreement, was valid only if there was consideration to support the defendant's promise therein.

In the subject agreement (A 21-23) there is no consideration to support any alleged option.

American has not shown and cannot show that it will, with reasonable certainty, succeed on the merits at a final hearing. Referring to *Hall Signal Co. v. General Ry. Signal Co., supra,* it was stated:

> "It is a cardinal principle of equity jurisdiction that a preliminary injunction shall not issue in a doubtful case. Unless the court be convinced with reasonable certainty that the complainant must succeed at final hearing the writ should be denied. Union Switch & Signal Co. v. Philadelphia R.R. Co. (C.C.) 75 Fed. 1004." (153 Fed. at p. 908).

C. American Has Not Shown That It Will Suffer Irreparable Injury.

American argues it will suffer irreparable injury if its cigarette advertisements are not published on the back cover of Playgirl Magazine. For some unexplainable reason, American finds the subject back cover unique contrary to all common sense. Equally unexplicably, American is now unable to determine the value of advertising. But American has offered nothing to support its conclusion that it will suffer irreparable injury.

American has offered to the Court no evidence whatsoever, not contradicted on the record, to support its allegation that the back cover of one magazine is unique among the hundreds of other magazines sold in the United States all having back covers on which advertising appears, such advertising often being for American's cigarettes.

It is highly questionable whether American would, in fact, suffer any damage by its advertising not appearing on the back cover of Playgirl Magazine or any other magazine. Referring to *Moody's Industrial Man-*

ual for 1973, page 1352, it is reported that in each of the fiscal years 1971 and 1972, notably before Playgirl Magazine came into existence, American had net sales from tobacco products of in excess of $2 billion. That amount constituted more than seventy percent (70%) of American's total net sales for each of said fiscal years. It is near absurd to think that the appearance or nonappearance of American's advertising for its cigarettes in a single magazine such as Playgirl Magazine could now cause irreparable injury. Certainly this one new magazine has not replaced that advertising media which has in the past reaped for American such enormous net sales. In fact, the existence or nonexistence of Playgirl Magazine would seem to make no difference whatsoever to American and its apparent ability to sell cigarettes and the like.

American now seeks to show that advertising space in a magazine is unique by comparison with everything from carrots and tomatoes to trucking licenses and personal services to land. But none are here involved and the Court was not unaware of American's total failure to show any irreparable injury.

Referring to the transcript of the hearing before Judge Brieant, it was stated:

> "THE COURT: . . . I would assume if there is a breach of contract here that your client can mulct this defendant for substantial money damages. Why isn't that an adequate remedy?
>
> "MR. O'NEILL: We don't believe a money damage remedy is adequate. This is a back cover of a magazine.
>
> "THE COURT: That is nonsense. You have to show me how you cannot be adequately com-

pensated. You are selling some merchandise and you paid a price for this cover?

"MR. O'NEILL: Yes.

"THE COURT: The cover has a value in excess of the price, isn't that so? This right to be on this cover of Playgirl is worth more money than you agreed to pay for?

MR. O'NEILL: I am not sure I agree with that. I am not sure that that is the way the advertising people look at it."

* * *

"THE COURT: I have read the papers. I think your position is ridiculous.

I just do not see how you can show irreparable damages on this." (A 119, 120, 121).

Finally, the Court found that "there is no showing of irreparable damage that would not be compensable by money damages." (A 129).

American prefers to ignore the simple fact that there is no negative covenant in the subject agreement and seeks to rely on case law in which courts have enforced such negative covenants. But again the Court was not deceived, and recognized the distinction between such cases and the instant case. Again referring to the transcript of the hearing before Judge Brieant, it was stated:

"THE COURT: Is there anything further?

"MR. O'NEILL: Your Honor, if I may point out to the Court the decision of *Goddard against the American Queen,* and 1899 First Department —New York State decision.

"THE COURT: Do you have it with you?

"MR. O'NEILL: It's in my brief which is in the papers which are included. There the decision

of the Trial Court to deny a Motion for Preliminary Injunction and advised that damages was the proper remedy was overruled by the Appellate Division saying, 'No specific performance of a contract not to publish competitor's advertising was the proper remedy.'

"THE COURT: That is a different fact.

"MR. O'NEILL: I can't find a case that is on all fours. That is the closest thing I can find." (A 128).

It is clear on the record that American has utterly failed to offer any evidence that it will suffer irreparable injury. No preliminary injunction could be properiy granted.

IV.

The Findings of the District Court Are Not Clearly Erroneous and There Has Been No Abuse of Discretion.

The Court found in view of the pleadings, affidavits, and other papers on file that "the litigation . . . presents fair grounds for controversy" and "that the issues can be litigated and the Complaint ought not to be dismissed on tis face." (A 129). The Court further stated:

". . . I am not determining that the Complaint does not state a cause of action. I think it presents fair grounds for litigation. That is close to the question of probability of success. But even if I were convinced that they had a very substantial probability of success, I would still believe that money damages would be adequate and that he would have adequate remedy." (A 131).

Clearly, no finding was made that there was a reasonable certainty that American would succeed on the merits at a final hearing. However, the Court did find that American will not suffer irreparable injury.

Further, with respect to irreparable injury, the Court stated:

> ". . . [T]here is no showing of irreparable damage that would not be compensable by money damages. Adverstising (sic) on magazines, as the Court well knows, in this country is available to advertisers and there are a number of magazines in business in this area and elsewhere, and Playgirl is not the only one in its field or the only one in the area." (A 129).

The Court's findings are readily supported by the record and are not clearly erroneous in view thereof. Hence, the Court's refusal to grant a preliminary injunction as requested by American, is not an abuse of discretion.

The Court also noted that were it "to issue a mandatory injunction compelling the printing and publishing of particular advertising, the Court would be called upon . . . to supervise the production of the magazine." (A 129). Again referring to *Unicon Management Corp. v. Koppers Co., supra,* it was stated:

> ". . . [I]t is generally true that courts should not, in the exercise of sound discretion, grant relief which requires 'continuous judicial supervision,' cf. Bethlehem Engineering Export Co. v. Christie, 105 F.2d 933, 935 (2 Cir. 1939)." (366 F.2d at p. 205).

Finally, the Court found with respect to the balance of equities, that Playgirl would in effect suffer hardship

from the granting of a preliminary injunction, and American would enjoy no benefit. The Court stated:

> ". . . [T]here is a question of the balancing of the interest or the balancing of the equities herein. Plaintiff's benefit, if he prevailed on such a mandatory preliminary injunction pending trial, would, in my opinion, be quite slight. He would have the benefit of advertising for which he would pay the generally going rate for advertising.
>
> "If, as alternatively suggested by the plaintiff, we enjoined the defendant from accepting or printing anyone else's advertisement on the back page of the magazine with the result that the magazine would express itself with a blank page, this would be a total loss as far as the economy is concerned. It would be a waste of available resources with no countervailing benefit to the Courts or to the Plaintiffs.
>
> "I just believe that on the entire consensus this is not a proper case for equitable relief pending trial." (A 130).

Such finding of the Court is most certainly clearly accurate.

It is accordingly submitted that the District Court's findings are properly supported by the record and that the Court did not abuse its discretion by denying American's motion for a preliminary injunction requiring Playgirl to print cigarette advertising of American, or not print the advertising of any other advertiser, on the back cover of Playgirl Magazine.

Conclusion.

The District Court's findings and conclusions that American has not shown that it will suffer irreparable injury, that to grant a mandatory injunction would require supervision of Playgirl Magazine by the Court, and that the balance of hardships if an injunction were granted would fall on Playgirl are clearly accurate. The Court did not find that American has established that it will, with reasonable certainty, succeed on the merits at a final hearing.

The District Court has not abused its discretion by denying American's motion for a preliminary injunction and the decision of the District Court should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 6500 Flotilla Street, Los Angeles, California.

On April 16, 197.4, I served the within

APPELLEE'S BRIEF in re: "American Brands vs. Playgirl Inc.", in the United States Court of Appeals for the Second Circuit, No. 74-1357;

on the attorneys in said action, by placing 2 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

P. G. PENNOYER, JR.,
DANIEL J. O'NEILL
CHADBOURNE, PARKE, WHITESIDE & WOLFF
30 Rockefeller Plaza
New York, New York 10020

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on April 16, 197.4, at Los Angeles, California

Joan Drennen

Service of the within and receipt of a copy thereof is hereby admitted this 16 day of April, A.D. 1974.

Proof of Service Enclosed